UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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July 28, 2005

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Subject: ***In re Roger Lee Oletzke and Delores Annette Oletzke***
Chapter 12; Bankr. No. 86-10254

Dear Counsel:

The matter before the Court is Debtors' Motion to Avoid Lien. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, the Small Business Administration will be ordered to cooperate with Debtors in executing such documents as may be required to evidence its release of its mortgage(s) against Debtors' real property.

Summary. Roger Lee Oletzke and Delores Annette Oletzke ("Debtors") filed a petition for relief under chapter 11 of the bankruptcy code on September 23, 1986. On their schedule of creditors holding secured claims, Debtors listed seven creditors, including Federal Land Bank ("FLB") and the Small Business Administration ("SBA"). According to Debtors, FLB's claim for $286,000 was secured by a first mortgage on Debtors' real property, and SBA's claim for $42,500 was secured by a second mortgage on Debtors' real property. On their schedule of real property, Debtors assigned a value of $106,000 to the real property securing FLB's and SBA's claims.

On October 30, 1986, Attorney Haverly filed a notice of appearance on behalf of SBA. On that same date, SBA filed a proof of claim. According to its proof of claim, SBA held a claim for $40,525.89 secured by mortgages against Debtors' real property.

On March 23, 1987, Debtors filed a motion to convert their case to chapter 12. On April 16, 1987, the Court[1] entered an order granting Debtors' motion to convert.[2]

On May 22, 1987, Attorney Haverly filed a second notice of appearance on behalf of SBA. On that same date, SBA filed a second proof of claim. According to its proof of claim, SBA held a claim for $42,038.52 secured by mortgages against Debtors' real property.[3]

On October 28, 1987, Debtors filed their chapter 12 plan. In their plan, Debtors proposed the following treatment for SBA's claim:

> On May 22, 1987, Small Business Administration filed a Proof of Claim in the amount of $42,038.52 secured by a second mortgage on all of the Debtors' real estate, and in that there is no equity available to SBA on its second real estate mortgage, Small Business Administration's claim is totally undersecured and, accordingly, the indebtedness to Small Business Administration will be treated separately under paragraph (H) which provides for payment of Trustee's fees, undersecured and unsecured creditors.

"Chapter 12 Trustee's fees, undersecured and unsecured creditors" were to be paid as follows:

> [T]he remaining balances . . . shall likewise be delivered to the Chapter 12 Trustee for . . . his fees . . . and for payment . . . to unsecured and undersecured creditors on a pro rata basis. . . . After distribution of dividends from the last payment

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[1] The Honorable Peder K. Ecker, presiding.

[2] On April 24, 1987, FLB filed a notice of appeal from the Court's order granting Debtors' motion to convert. On July 13, 1987, the District Court entered an order affirming the Court's order.

[3] While not denominated as an amended proof of claim, this proof of claim appears to have been intended to amend SBA's first proof of claim. SBA admits in its response to Debtors' motion to avoid lien that it held a claim for $42,038.52 on the date Debtors filed their petition for relief.

> made through the office of the Chapter 12 Trustee on January 1, 1991, all remaining unsecured and undersecured indebtedness . . . will be deemed paid and satisfied in full.

Debtors served their plan and a notice of hearing on all their creditors, including SBA. The United States Trustee, the chapter 12 trustee, the Farmers Home Administration ("FmHA"), and FLB all filed objections to Debtors' plan. SBA did not.

On December 10, 1987, the Court[4] held a hearing on confirmation of Debtors' plan. The chapter 12 trustee, the attorney for FmHA, and the attorney for FLB appeared at the hearing. SBA did not. Debtors informed the Court they would file a restated plan[5] to address the various objections that had been filed.

On January 19, 1988, Debtors filed their restated plan. In their restated plan, Debtors proposed the same treatment for SBA's claim they had proposed in their original plan. On January 28, 1988, the Court entered an order confirming Debtors' plan. No creditor or other party in interest, including SBA, filed a notice of appeal from the Court's order.

On January 24, 1991, Debtors filed a motion for discharge. Debtors served their motion and a notice of hearing on all their creditors, including SBA. The chapter 12 trustee and Farm Credit Bank ("FCB") (formerly known as Federal Land Bank of Omaha) filed objections to Debtors' motion. SBA did not. On November 26, 1991, the chapter 12 trustee filed a motion to approve a settlement of the objections to Debtors' discharge. On December 20, 1991, the Court entered an order approving the proposed settlement. On January 8, 1993, the Court entered an order granting Debtors a discharge.

On February 8, 1993, the chapter 12 trustee filed his final report and account. According to the chapter 12 trustee's final report and account, SBA received $3,117.17 as an undersecured creditor under Debtors' plan.

On May 11, 2005, Debtors filed a motion asking the Court to

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[4] This case was transferred to the undersigned on October 16, 1987.

[5] Such a plan would now be referred to as a "plan as confirmed." *See*, *e.g.*, LBR Appendix 25.

avoid SBA's lien against Debtors' real property, based upon Debtors' treatment of SBA's claim as a "completely undersecured" claim under their plan. On May 23, 2005, SBA filed a response to Debtors' motion, citing the Court to *JaKS Farm Custom Forage Harvesting, L.L.C. v. Anderson* (*In re Anderson*), 305 B.R. 861 (B.A.P. 8th Cir. 2004), for the proposition that Debtors could not use their plan and their motion to avoid SBA's lien. On June 8, 2005, the Court asked the parties to submit briefs on the applicability of the Court's decision in *In re Cloverleaf Farmers' Cooperative, Inc.*, Bankr. No. 89-40531, slip op. (Bankr. D.S.D. June 1, 2004), a relatively recent case involving similar facts in which the Court first discussed *Anderson*. On July 8, 2005, both parties did so, and the matter was taken under advisement.

Discussion. In *Anderson*, the debtors filed a chapter 12 plan that classified any judgment against them as an unsecured claim and purported to avoid any related judgment lien. Over the objection of one such judgment creditor, the bankruptcy court confirmed the debtors' plan. On appeal, the Bankruptcy Appellate Panel held:

> [I]f debtors wish to avoid a lien as being without value they must take affirmative steps to bring that issue before the Court, and must prove that there is no equity to support such lien.

Anderson, 305 B.R. at 867. Because the debtors had not taken such affirmative steps, the Bankruptcy Appellate Panel concluded:

> [T]he [bankruptcy] court erred as a matter of law when it confirmed a Chapter 12 plan that failed to provide for the claim of a secured creditor, as required by section 1225(a)(5) of the Code.

Ibid.

The difference between *Anderson* and the instant case is, of course, that SBA did not appeal the Court's order confirming Debtors' plan. That difference is significant in light of the longstanding rule in the Eighth Circuit that 11 U.S.C. § 1227(a)[6]

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[6] Section 1227(a) provides that "the provisions of a confirmed plan bind the debtor, each creditor, each equity security holder, and each general partner in the debtor, whether or not the claim of such creditor, such equity security holder,

bars a collateral attack on an order confirming a chapter 12 plan.

> If the government were challenging something that actually happened in the confirmation proceedings (e.g., the valuation of the claim on the contract for deed at $113,800) or raising an argument that could have been decided during the confirmation hearing (e.g., that the Plan should not have been confirmed because it did not meet the Code's requirements), those arguments would be barred except on appeal of the confirmation order.

Harmon v. United States, 101 F.3d 574, 582 n. 5 (8th Cir. 1996) (citations omitted). *See also First National Bank v. Allen* (*In re Allen*), 118 F.3d 1289, 1294 (8th Cir. 1997); *Rowley v. Yarnall*, 22 F.3d 190, 194 (8th Cir. 1994); *Schellhorn v. Farmers Savings Bank (In re Schellhorn*), 280 B.R. 847, 853 (Bankr. N.D. Iowa 2002) (citations omitted).

In this case, Debtors' plan proposed to treat SBA's claim as wholly undersecured. SBA received proper notice of both Debtors' plan and the confirmation hearing. If it did not agree with Debtors' proposed treatment of its claim, SBA should have objected to Debtors' plan and, if necessary, appealed the Court's order confirming Debtors' plan. It did not do so. SBA is therefore bound by Debtors' confirmed plan.

Unless the plan or the order confirming the plan provides otherwise, the confirmation of a plan vests all of the property of the estate in the debtor free and clear of any claim or interest of any creditor provided for by the plan. 11 U.S.C. §§ 1227(b)and (c).

> [W]here a debtor's plan does not expressly preserve a secured creditor's lien, the confirmation of a plan acts to extinguish the lien *provided that*: 1) the lienholder participated in the debtor's bankruptcy case by filing a proof of claim; and 2) the property was either "dealt with" or "provided for" by the plan.

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or such general partner in the debtor is provided for by the plan, and whether or not such creditor, such equity security holder, or such general partner in the debtor has objected to, has accepted, or has rejected the plan."

In re Siemers, 205 B.R. 583, 585 (Bankr. D. Minn. 1997) (emphasis in original) (citing *Harmon*, 101 F.3d at 581-82; *FDIC v. Union Entities* (*In re Be-Mac Transp. Co.*), 83 F.3d 1020, 1027 (8th Cir. 1996)). *See also In re Harnish*, 224 B.R. 91, 94 (Bankr. N.D. Iowa 1998).[7]

In this case, SBA participated in Debtors' case by filing two proofs of claim and two notices of appearance. SBA's claim was expressly dealt with and provided for by Debtors' plan. Neither Debtors' plan nor the Court's order confirming Debtors' plan preserved SBA's lien. As a result, SBA's lien was extinguished upon confirmation of Debtors' plan.

The Court will enter an appropriate order.

Sincerely,

Irvin N. Hoyt
Bankruptcy Judge

INH:sh

cc: case file (docket original; serve parties in interest)

[7] *Siemers* and *Harnish* are chapter 13 cases. However, the language of 11 U.S.C. §§ 1327(b) and (c) is essentially identical to that of §§ 1227(b) and (c).